

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON
 PORTLAND DIVISION

JAMES A. ROSS,
 an individual,

Plaintiff,

v.

No. CV-09-1530-HU

MARK NOOTH, Superintendent;
 SRCI; LT. HORTON; SGT. BENNET
 SGT. SMITH; DR. GULLICK; C/O
 J. SHEPARD; HONSELY, hearings)
 officer; GILLUM, Housing
 Assignments Officer, and
 additional defendants listed
 under Section III of the
 Complaint,

FINDINGS & RECOMMENDATION

Defendants.

James Arthur Ross
 12599830
 EOCI
 2500 Westgate
 Pendleton, OR 97801
 Pro Se Plaintiff

E. Aaron Sprague
 Oregon Department of Justice
 Trial Division
 1162 Court Street NE
 Salem, OR 97301
 Attorney for Defendants

1 HUBEL, Magistrate Judge:

2 Plaintiff James Arthur Ross, an inmate at Eastern Oregon
3 Correctional Institution ("EOCI"), brings four constitutional
4 claims under 42 U.S.C. § 1983 against prison officials Dr. Gullick,
5 Sgt. Smith¹, Gillum, Honsely, Lt. Horton, Sgt. Bennet, and John Doe
6 Physical Plant Supervisor. Before the court is the defendants'
7 motion to dismiss Ross' first and fourth claims.² For the reasons
8 set forth below, I recommend granting the motion.

9 **FACTS**

10 Ross, who is currently incarcerated at EOCI, was formerly
11 housed at the Snake River Correctional Institution ("SRCI"), where
12 the events pertinent to this motion took place. When Ross filed
13 his Complaint on December 31, 2009, he alleged many different
14 causes of action. This court dismissed some of Ross's claims in an
15 Order dated February 10, 2010 [doc. #5]. Following the filing of
16 Ross's Amended Complaint, this court narrowed the existing claims
17 further in its order dated April 23, 2010 [doc. #8]. At present,
18 Ross has four claims pending against the defendants. Claim one
19 alleges that Dr. Gullick denied Ross constitutionally adequate
20 medical treatment. Claim two is a First Amendment retaliation
21 claim against Smith, Gillum, Horton, Bennet, and John Doe Physical
22 Plant Supervisor. Claim three is an Eighth Amendment claim against
23 defendants Smith, Horton, Bennet, and Shepard. It alleges Ross's
24 constitutional rights were violated by the defendants when they

25
26 ¹ Neither the complaint nor the motions detail the first
names of the defendants.

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28 ² Defendants specify in the Reply, at 2, that the motion is
directed only at the first and fourth claims.

1 forced him to choose between being in a cell with a violent inmate
2 or going to disciplinary segregation. Claim four is an equal
3 protection claim against Dr. Gullick. It alleges that Dr. Gullick
4 violated Ross's constitutional rights because he did not provide
5 pain killers as strong as the medications he provided to other
6 inmates. The facts set forth below pertain only to the first and
7 fourth claims.

8 Ross has back pain stemming from an on the job injury when he
9 worked for U-Haul prior to his incarceration on September 2, 2004.
10 According to Ross, following his injury he was advised he should
11 have surgery after it was approved by insurance, and given a
12 "prescription of Vicodin 5.5 to take two tablets up to three times
13 a day as needed for the pain." Compl. at 9. Before he could have
14 the operation, however, he was convicted of attempted aggravated
15 murder, kidnapping, rape, and sodomy, and sentenced to 40 years in
16 prison. He alleges that since his arrival at SCRI, he "has
17 struggled with the medical staff . . . and more specifically Dr.
18 Gullick, for continued and satisfactory medical treatment for [his]
19 serious back injury." Compl. at 10.

20 Shortly before May 3, 2008, Ross allegedly injured his ankle
21 while playing soccer at SCRI. He initially limped back to his
22 cell, for fear that he would be sent to the infirmary and lose his
23 spot in privileged housing. On May 3, 2008, he went to see medical
24 personnel, however, and Nurse Bonner allegedly refused to provide
25 medical treatment. Ross filed a grievance and obtained medical
26 treatment for his ankle four days later. He was subsequently sent
27 to see Dr. Gullick about his ankle, and took the opportunity to
28 confront him about his back problems. Dr. Gullick scheduled Ross

1 for an appointment to see Nurse Dean who would do research about
2 the validity of Ross's back injury, including trying to find
3 insurance records of the injury. In the mean time, Dr. Gullick
4 provided Ross with a medication for pain that Ross believed was
5 called "Feldine," which he found insufficient. Dr. Gullick
6 scheduled Ross for a second appointment and gave him another
7 medication, "Normatripylnee,"³ which Ross complained made him feel
8 "really weird, uncomfortable, and sick." Compl. at 12. Ross
9 alleges he found out later that the medication was actually an
10 anti-depressant. He was already taking another unspecified anti-
11 depressant, and stopped taking the Nortriptyline.

12 On August 26, 2008, Ross sent Dr. Gullick a kyte requesting an
13 appointment to discuss the medication and his ankle, which was not
14 healing to his satisfaction. Dr. Gullick scheduled an appointment
15 for August 28, 2008, and informed Ross that ankle injuries take
16 time to heal, and allegedly said that he might need an MRI at some
17 point. Ross allegedly asked Dr. Gullick about the anti-depressant
18 he prescribed for Ross's ankle pain, and Dr. Gullick allegedly
19 responded that "they are now using those meds to treat people like
20 [Ross]." Compl. at 13. According to Ross, a confrontation ensued
21 where Dr. Gullick told Ross he was unable to find any evidence of
22 his back injury, and that given his posture and gait, he believed
23 that Ross simply wanted to abuse narcotic pain medication.

24 Ross began two separate grievance processes in connection with
25 the events detailed herein. First, he filed Grievance No.
26 2008.05.003 ("May 3 grievance") between May 3 and May 6, 2008,

27
28 ³ "Nortriptyline" is the proper name of an anti-depressant.

1 alleging mistreatment during a medical visit on May 3, 2008 to
2 address the ankle injury he experienced during a soccer game.
3 Decl. Teresa Hicks ¶ 11. The May 3 grievance was forwarded to
4 Shirley Hodge RN, who responded on June 5, 2008. Hicks Decl. ¶ 12.
5 Ross did not file a grievance appeal to Hodge's response. Hicks
6 Decl. ¶ 13. Ross explained, "In my opinion, at the time of the
7 response, I had nothing to appeal or continue to complain about."
8 Pl.'s Mot. Obj. Def.'s Mot. Dismiss at 2.

9 Between August 28, 2008, and September 2, 2008, Ross filed
10 Grievance No. 2008.09.008 ("August 28 grievance") complaining of
11 mistreatment by Dr. Gullick related to his ankle and back injuries.
12 Hicks Decl. ¶ 14. On October 24, 2008, Shirley Hodge responded to
13 the August 28 grievance,

14 I have reviewed your grievance and medical record
15 regarding your concerns. I am sorry if you felt like
16 your provider did not listen to your concerns. I have
17 requested a chart review with Dr. Gullick and the TLC
18 committee. I will request a plan of care that addresses
19 your concerns. If your symptoms become worse at any
20 time, please request sick call. If you have any further
21 questions, please let me know.

22 Hicks Decl. ¶ 15. On November 7, 2008, Ross filed a grievance
23 appeal related to the August 28 grievance. Hicks Decl. ¶ 16. On
24 January 6, 2009, Dr. Steve Shelton responded to the appeal,

25 In the original grievance response sent by Medical
26 Services Manager Hodge she indicated she was going to
27 request a chart review with Dr. Gullick and the
28 Therapeutic Level of Care (TLC) Committee. I have been
informed that on October 29, 2008, your chart was
referred to TLC for a plan of care review and at that
time a second opinion was authorized. I also have been
informed you have been scheduled with Dr. Elliott-
Blakeslee for a second opinion. Please watch the call
out for your pending appointment. In the interim, if you
do not believe that your medical needs are being met or
that your condition has changed, please send an Inmate
Communication to SRCI Health Services so that you may be
scheduled for Sick Call and/or a provider appointment.

1 Thank you.

2 Hicks Decl. ¶ 17. According to Ross, he attempted to file a second
 3 grievance appeal, but it was denied because it related to a
 4 disciplinary report. The evidence of record, however, shows that
 5 instead of filing a second grievance appeal to the August 28
 6 grievance, he filed a new third grievance on November 19, 2008,
 7 Grievance No. 2008.12.049, related primarily to his removal from
 8 privileged housing. Supp. Decl. Teresa Hicks Ex. 2, at 2. This
 9 final grievance was returned without action because "Misconduct
 10 Reports are not eligible for the grievance process." Id. at 1.

11 STANDARD

12 A motion to dismiss based on a prisoner's failure to exhaust
 13 administrative remedies is properly brought as an unenumerated Rule
 14 12(b) motion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.
 15 2003). "In deciding a motion to dismiss for failure to exhaust
 16 non-judicial remedies, the court may look beyond the pleadings and
 17 decide disputed issues of fact." Id. at 1119-20. Nonexhaustion is
 18 an affirmative defense which must be raised and proved by the
 19 defendants. Id. at 1119. If the court concludes administrative
 20 remedies have not been exhausted, the unexhausted claim should be
 21 dismissed without prejudice. Id. at 1120.

22 DISCUSSION

23 Defendants move to dismiss Ross's first and fourth claims on
 24 the ground that he did not exhaust his administrative remedies.

25 The Prison Litigation Reform Act ("PLRA") of 1995 amended 42
 26 U.S.C. § 1997e to provide that "[n]o action shall be brought with
 27 respect to prison conditions under Section 1983 . . . by a prisoner
 28 confined in any jail, prison, or other correctional facility until

1 such administrative remedies as are available are exhausted." 42
2 U.S.C. § 1997e(a). A prisoner does not satisfy the PLRA's
3 exhaustion requirement by merely demonstrating that administrative
4 remedies are no longer available. Woodford v. Ngo, 548 U.S. 81, 87
5 (2006). Instead, he must "complete the administrative review
6 process in accordance with the applicable procedural rules,
7 including deadlines, as a precondition to bringing suit in federal
8 court." Id. The exhaustion requirement is mandatory, even when
9 the prisoner seeks relief not available in grievance proceedings.
10 Porter v. Nussle, 534 U.S. 516, 524 (2002).

11 The Oregon Department of Corrections ("ODOC") has established
12 an administrative review procedure whereby inmates are encouraged
13 to first attempt to resolve disputes with staff through
14 face-to-face verbal communication or in writing. OAR 291-109-0120.
15 If face-to-face or written communication does not resolve the
16 dispute, inmates may file a formal written grievance. OAR
17 291-109-0140(1)(a). The grievance will be forwarded to the
18 appropriate staff person for a response. If the inmate is not
19 satisfied with the response he receives, he may appeal by filing a
20 grievance appeal form within 14 days. OAR 291-109-170(1)(a). The
21 appeal is then forwarded to the functional unit manager for review
22 and response. If the inmate is not satisfied with the functional
23 unit manager's decision, he may appeal that decision within 14 days
24 by sending a grievance appeal to the assistant director. OAR
25 291-109-0170(2)(a). The assistant director's decision is final and
26 is not subject to further review. OAR 291-109-0170(2)(d). When a
27 prisoner pursues a remedy to that point he or she has exhausted his
28 or her administrative remedies.

7 - FINDINGS AND RECOMMENDATION

1 Here, Ross filed two grievances in connection with his first
2 and fourth claims. After filing the May 3 grievance, and receiving
3 a response, Ross did not appeal. In order to exhaust his
4 administrative remedies, under OAR 291-109-170(1)(a) and OAR
5 291-109-170(2)(a), appeals were required and available.

6 After filing the August 28 grievance, Shirley Hodge responded
7 to Ross. Ross appealed Hodge's response to Dr. Steve Shelton, who
8 responded on January 6, 2009. Hicks Decl. Ex. 3 at 21. Ross did
9 not appeal further. Under OAR 291-109-0170(2)(a), a further appeal
10 was required and available to Ross.

11 For the above reasons I find that Ross failed to exhaust his
12 administrative remedies with respect to his first and fourth
13 claims. Accordingly, I recommend that Ross's first and fourth
14 claims be dismissed without prejudice.

15 **CONCLUSION**

16 Defendants' Motion to Dismiss [Doc. #22] should be granted,
17 and plaintiff's claims dismissed without prejudice.

18 **SCHEDULING ORDER**

19 The Findings and Recommendation will be referred to a district
20 judge. Objections, if any, are due April 12, 2011. If no
21 objections are filed, then the Findings and Recommendation will go
22 under advisement on that date.

23 If objections are filed, then a response is due April 29,
24 2011. When the response is due or filed, whichever date is
25 earlier, the Findings and Recommendation will go under advisement.

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1 IT IS SO ORDERED.

2 Dated this 25 day of March, 2011.

3
4 /s/ Dennis J. Hubel

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Dennis James Hubel
United States Magistrate Judge